United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1369

In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1369

UNITED STATES OF AMERICA,

Appellee,

v.

MILTON PARNESS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

JAY GOLDBERG
Attorney for Appellant
299 Broadway
New York, New York 10013
(212) 374-1040

MICHAEL RATNER
Of Counsel

TABLE OF CONTENTS

TABLE OF CASES

PAGE

Statutes

In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1369

UNITED STATES OF AMERICA,

Appellee,

v.

MILTON PARNESS,

Appellant.

BRIEF FOR APPELLANT

Questions Presented

1. Whether the District Court erred in denying Appellant's motion for a new trial where the government failed to disclose some twenty-six letters from the government's chief witness to the prosecutors shortly before trial, which letters contain

(a) information vital to the previously undisclosed motivation of the witness who presented himself as reluctant and uncooperative;

(b) information establishing the witness's friendship with the prosecutors and eagerness to cooperate, completely contradicting his trial testimony that he "hated" them;

(c) facts demonstrating the witness's previously undisclosed desperate mental and physical state;

(d) evidence which contradicted facts testified to by the witness at trial, crucial to the government's theory of the case and relied upon by this Court in its affirmance; and

(e) evidence establishing the witness's repeated perjury at trial.

2. Whether the above material was of such "high value" to the defense that the prosecutors' failure to turn it over prior to trial constituted "gross negligence" such as to require a new trial.

3. Whether the District Court, on a record which did not include any affidavits by the prosecutors who received the letters, erred in not holding a factual hearing, and finding nonetheless, that the prosecutors' failure to turn over the letters was merely "inadvertent."

4. Whether the District Court erred in denying a hearing where the evidence established two crucial promises to the key government witness and the government's "denials" were incomplete and inadequate.

5. Whether the Government's knowing use of false testimony and its nondisclosure and suppression of evidence favorable to the defendant mandated a new trial.

6. Whether the District Court's failure to vacate appellant's sentence was error where

(1) the sentence was premised on otherwise inadmissible evidence adduced by the government at a hearing allegedly held pursuant to the "Dangerous Special Offender" statute, 18 U.S.C. § 3575; and

(2) the § 3575 hearing and the entire sentencing proceeding were jurisdictionally defective for failure to comply with the notice requirements of the statute.

Preliminary Statement

This appeal is from an order of the District Court for the Southern District of New York denying Parness's motion for a new trial (Bonsal, J.) and from an order denying Parness's motion for a reduction or vacation of sentence (September 2, 1975) (J552—561).[1]

Parness was convicted of two counts of causing the interstate transportation of stolen property (18 U.S.C. 2314), one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud (18 U.S.C. 2314), and one count of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity (18 U.S.C. §§ 1961, 1962(b) and 1963).

Parness was sentenced to ten years on each count, sentences to run concurrently, and a fine of $55,000.

The conviction was affirmed by this Court, *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974) and certiorari was denied, 419 U.S. 1105 (1975).

Parness is currently free on bail pending the outcome of this appeal.

Statement of Facts

A. The Indictment and Theory of the Case[2]

Count I of the indictment charged Parness with acquiring Goberman's 90.5% controlling interest in the St.

---

[1] References beginning with "J" are to the Appendix on this appeal; references followed by "a" are to the Appendix on the direct appeal.

[2] The facts are fully set forth in this Court's opinion *United States* v. *Parness*, *supra*.

Maarten Isle Hotel Corp., N.V. ("Hotel Corp.") through a pattern of racketeering activity in violation of 18 U.S.C. § 1961(B) and 1961(5)(8a).

The underlying "acts of racketeering" included the acts charged in the three substantive counts, Counts Four, Five and Six. A prerequisite of obtaining a conviction on Count I is a conviction on at least two of the substantive counts.

The indictment alleged, and Goberman testified at trial, that on or about September 1, 1970 Parness and his company, Olympic Sports, Inc. ("Olympic") became the exclusive operator of gambling junkets from the United States to the Hotel Corp's casino (70a).[3] As part of this activity Goberman testified that Parness was *exclusively* responsible for collecting the moneys lost by gamblers on these junkets. These moneys included payments of I.O.U.'s known as markers representing losses that gamblers incurred while playing on credit at the casino. Parness was then responsible for remitting these "marker" moneys to Goberman or the Hotel Corp.

On or about October 5, 1970, Goberman borrowed $150,000 from Leonard Holzer for the benefit of Hotel Corp., secured by a pledge of his interest in Hotel Corp. (the "Holzer loan") (89a).

By late January, 1970, this loan had become due, but Goberman did not have the funds to repay it and was in jeopardy of losing his interest in Hotel Corp. (103a). Goberman claimed at trial that he did not have the funds because Parness had failed to remit $350,000[4] in marker collections to Hotel Corp. (489a-492a).

---

[3] Gambling is entirely legal on St. Maarten.

[4] Goberman testified at trial that $400,000 in marker collections were outstanding, but that because bad debts only $350,000 was collectible.

At this time (February 1-9, 1971) Parness loaned Goberman the $160,000 necessary to pay off the Holzer loan, the interest and attorneys fees. Again, Goberman pledged his stock interest (242a). Although Parness extended the loan for an additional month, Goberman still could not pay it and Parness foreclosed on the stock, thereby gaining control of Hotel Corp.

The government's theory at trial was that the money Parness loaned to Goberman to pay the Holzer loan was, in fact, the proceeds of "marker" collections which Parness had collected but failed to remit to the Hotel Corp. or Goberman (10a, 47a). Thus, Parness was lending Goberman $160,000 which actually belonged to Goberman or Hotel Corp.[5]

B. The Essential Facts as Found by this Court, Based Solely on the Testimony of Goberman

On appeal to this Court Parness claimed that the "government failed to establish that the cashier's checks, which [he] caused to be transported in interstate commerce, represented converted marker collections." *United States* v. *Parness*, *supra*, at 435.

---

[5] This loan of $160,000 forms the basis of substantive Counts Four and Six. Count Four charged that on February 4, 1971 Parness caused the interstate transportation of two cashier's checks in the amounts of $150,000 and $5,000, "the funds for the purchase of which cashier's checks included funds that had been stolen, converted and taken by fraud from Hotel Corp." (16a). Count Six is similar to Count Four except that the amount of the check is $5,000 and the transportation took place on February 9, 1971 (16a-17a).

Count Five charged that pursuant to a scheme to defraud, Parness induced Goberman to travel to New Jersey where he picked up the two cashier's checks on February 4, 1971. The "scheme to defraud" was the loaning to Goberman of "marker" collections to repay the Holzer loan (16a).

Although this Court found that the government "did not trace the proceeds of particular marker collections from specific gambler-debtors through Parness and Olympic to Goberman in the form of a loan," it concluded that there was "ample circumstantial evidence from which the jury reasonably could find the requisite theft or conversion." *Id* at 436.

This "circumstantial evidence" consisted of the following essential facts, premised entirely upon Goberman's testimony:

First, that Parness had the "exclusive" right to manage junkets to the hotel and had "sole responsibility for collecting all of the hotel's outstanding marker receivables" *id.* at 434; (71a).

Second, that Hotel Corp. failed to receive approximately $350,000 in overdue marker accounts payable "during the period Parness had exclusive control of collections" *id.* at 436; (489a-492a).

Third, that $60,000 cash seized by the I.R.S., just prior to the Parness loan to Goberman, was the proceeds of marker collections *intended for Parness.*[6]

Each of these essential facts is contradicted by the contents of the twenty-six undisclosed letters or by the deposition testimony of Goberman and furthermore the letters contain the very motivations and reasons for this false testimony at trial.

---

[6] The fact of the seizure was, in turn, used to infer two additional crucial "circumstantial" facts: (a) that Parness was, indeed, making substantial marker collections at the time of his loan to Goberman, and (b) that the shortage of cash compelled him to resort to "the more easily traceable Olympic checks" used to loan Goberman part of the $160,000, thus permitting the exposure of the entire scheme.

C. The Twenty-six Undisclosed Letters[7]

(1) The Defense's Timely and Adequate Demand For Disclosure

Prior to trial Parness moved pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963) for disclosure of all exculpatory material (26a-27a). The government agreed to comply with the requirements of *Brady;* the District Court also granted the motion (38a). Parness also properly and timely requested all 3500 material.

However, despite these requests and continuous demands throughout trial, twenty-four letters written by the government's chief witness, Goberman, to the prosecutors in this case, and two letters written in return were never turned over to defense counsel.

(2) Improper Contemporaneous Retention By the Government

In actual fact, between December 13, 1972 and August 23, 1973[8] a total of twenty-four letters were sent by Goberman to various prosecutors working on the case, and 2 additional letters were sent to Goberman by agents of the government.[8] These letters were in the possession of the government, specifically its experienced Strike Force attorneys, on the very dates on which the *Brady* requests were made, but none of these prosecutors disclosed their contents or existence.

---

[7] The twenty-six letters appear in the Appendix in two places. The original, hand-printed letters are at J480-J519. Typewritten copies transcribed for the Court's convenience are at J565-J607.

[8] This was less than a month before trial actually commenced and clearly during a time when trial preparation was going on.

The majority of the letters, fifteen, were sent to R. J. Campbell, Attorney-In-Charge of Strike Force 18 in Washington, D.C., who obtained the indictment against Parness.

R. J. Campbell was the prosecutor[9] who supervised and participated in the investigation which led to the Parness indictment (J454). He conducted the majority of the grand jury proceedings in this case (270a-274a), was present when trial began (306a) and sat through Goberman's testimony.[10]

Significantly, although R. J. Campbell submitted an affidavit with regard to other post-trial matters, he never submitted an affidavit excusing his failure to turn over the fifteen letters prior to trial (J456).

Seven of the letters were sent to Michael Pollack, a special attorney with the Criminal Division of the Department of Justice, assigned to the Eastern District of New York. It is Pollack who issued the first grand jury subpoena to Goberman on November 8, 1971 and it is Pollack who some time in 1973 turned the case over to R. J. Campbell (J452). During the entire period when Goberman was dealing with Campbell, Goberman remained in contact with Pollack.

Another letter was sent to Agent Glase of the Treasury Department. Glase, the agent assigned to the case, spent

---

[9] The affidavit of Michael Pollack, the Eastern District prosecutor who first subpoenaed Goberman to a grand jury, stated that he turned the case over to R. J. Campbell for "debriefing and investigation" which led to Parness's indictment (J452). Further, in response to Pollack's requests about Goberman's problems, R. J. Campbell "maintained that Mr. Goberman was his witness and he would handle him as he saw fit" (J453).

[10] Campbell was with McGuire in his office when Goberman was going over his testimony just prior to trial (306a).

many hours interviewing Goberman, sat through the entire trial and was called by Parness as a defense witness (270a). Agent Glase never disclosed his possession of *Brady* material as requested by the defense.

Another series of letters were sent to prosecutors and I.R.S. officials in an attempt by Goberman to get back the $60,000 in marker moneys seized by the I.R.S. Copies of these letters were sent to either Campbell or Pollack.

One final letter was sent to McGuire less than two months prior to trial (J607). McGuire was the Assistant United States Attorney who tried the case. McGuire did not disclose his possession of the letter to the defense.

None of these above prosecutors submitted affidavits with rgard to their failure to turn over the letters.

(3) The Discovery of the *Brady* and 3500 Material

In March of 1975, more than a year-and-one-half after Parness's trial began, the defense first discovered the existence of the letters. This discovery occurred not through any belated pangs of conscience by the government, but only through a fortuitous combination of counsel's diligent work and happenstance.

Counsel, who was present in the Eastern District of Pennsylvania pursuant to a Goberman lawsuit discovered that in 1973, about the time of trial, Goberman had sued the United States for return of the $60,000 previously discussed (J413). A number of the twenty-six letters were submitted by Goberman in connection with this litigation.

Immediately recognizing their importance, counsel promptly submitted them to the Judge Bonsal with a mo-

tion for a new trial. Only after this motion was made were the remaining letters at last revealed, this time as attachments to an affidavit which the government was compelled to submit to the Court by virtue of the defense motion (J477).

(4) The Government's "Excuses" for the Nondisclosure

Obviously hard pressed to explain all of these facts, not one of the prosecutors or the agent, Glase, who received the twenty-six letters submitted affidavits explaining their failure to disclose the letters to defense counsel.

Only Dowd, a Strike Force 18 prosecutor who received none of the letters, but claims to have been responsible for *Brady* material at trial, submitted an affidavit "explaining" the nondisclosure of the letters (J477).

Dowd's explanation for the failure to produce seven of the letters is that they were in the administrative files of the Strike Force office and that he made "no search" of these files "prior to transporting the files to New York for the preparation of the case" (J480). Dowd never explains the failure to disclose the other nineteen letters.

Dowd's affidavit also contains a startling paragraph revealing that in the same month Parness was sentenced he received copies of still more letters which had prior to trial been sent to Campbell and Pollack.[11] Notwithstand-

---

[11] Dowd's affidavit states:

> 7. Following the trial of MILTON PARNESS and in or about mid-December 1973, your affiant received copies of letters which were attached to the post trial motion [March 25, 1975] along with an additional claim for fees and expenses (J478).

ing his own characterization of himself as the person responsible for *Brady* material and his obvious continuing obligation to turn such material over to the defense, Dowd retained these letters for over a year-and-a-half, finally disclosing them only when absolutely compelled by defense counsel's new trial motion.

Finally, at oral argument on the motion for a new trial, the Assistant [12] virtually admitted the government's culpability in not disclosing the letters. He explained that the letters went to the file in Washington, D.C. (Campbell and Dowd's office) and that

> *Mr. Dowd* [who was responsible for the *Brady* material] *apparently made no careful analysis* [of the file]. (Minutes of Argument, August 27, 1975 at 14)

(5) The Contents of the Letters

The twenty-six undisclosed letters cover a multitude of subjects and include crucial information either contradictory to essential facts as testified to by Goberman or new facts which would have formed an integral part of the defense's cross-examination of Goberman.

Because the information is intimately related to the legal issues raised herein and because it must be discussed together with the testimony adduced at trial, the contents of each of the relevant letters are discussed in the argument.

---

[12] Joel Rosenthal, an Assistant United States Attorney in the Office of the United States Attorney for the Southern District, was in no way involved in the nondisclosure of the letters.

D. The Promise to Return Goberman's Hotel and the $60,000 Taken by the I.R.S Agent

Goberman, in a sworn complaint submitted in the United States District Court for the Eastern District of Pennsylvania, entitled *Allan N. Goberman* v. *United States of America*, 74 Civ. 3230 (filed December 18, 1974), stated that R.J. Campbell had promised him the return of the hotel (J549).

And in oral argument in another civil case brought against Parness, entitled *Goberman* v. *Parness*, 74 Civ. 182 (D. Ct. N.J.), Goberman stated that the government was supposed to recover the hotel and return it to him (J345).

These two statements of Goberman's show his belief that the government promised him the return of his hotel. This promise was never disclosed to defense counsel.

A number of the twenty-six letters already discussed establish another promise—that Campbell and other prosecutors would aid Goberman in recovery of the $60,000 seized yb the I.R.S. The letters also establish that this promise was honored at least in part by help actually given.

In response to allegations of these promises, several prosecutors submitted affidavits. Significantly, however, Campbell, who allegedly made the promises, never actually denied that he had done so. He merely stated

> *That to the best of his present recollection* (Emphasis added)

no such suggestion or promise was made (J454).[13]

---

[13]The affidavits submitted by the other prosecutors, discussed in Point IV, *infra*, similarly contain no denials that Campbell may have given such a promise to Goberman.

E. The Depositions and Perjured Testimony of Goberman

As previously discussed, an essential factual element of the government's case was the contention that $350,000 in markers were due from Parness at the very time at which Parness loaned Goberman the ultimately fatal $160,000.

A year after trial in a civil suit brought by Goberman against Parness, the latter's counsel took depositions from Goberman which established that contrary to his testimony at trial, no money was owed by Parness to Hotel Corp. or Goberman on the critical date.[14] The depositions further revealed that at the time of trial the government was aware that Goberman's testimony on this matter was false, but did not reveal his perjury to defense counsel or the Court.

Both of these facts constituted newly discovered evidence which was additionally relied upon in the motion for the new trial submitted below.

F. The District Court's Opinion on the New Trial Motion

Notwithstanding all of the above facts and *without holding any evidentiary hearing*, the District Court denied Parness's motion for a new trial.

---

[14] In the proceeding below counsel submitted a lengthy affidavit explaining the manner in which Goberman's depositions modified the $350,000 he claimed Parness owed to Hotel Corp. (J18). This mathematically complex affidavit is summarized and discussed in Point V, *infra*, along with the general ramifications of the depositions for the new trial motion.

The Court assumed that the twenty-six letters constituted *Brady* or Jencks Act material, but "found" without a hearing, and because of its erroneous belief that the letters had not gone to the prosecutors who prepared the case, that the government's failure to turn them over was "inadvertent." The Court then applied the stricter of two possible legal standards, concluded that Parness had not met that standard, and denied a new trial (J560).

The Court also decided, without an evidentiary hearing, that no promises were made by the government to Goberman in exchange for his testimony. This finding was made despite Parness's submission of evidence to the contrary and without a denial from Campbell, the prosecutor who allegedly made the promises (J559).

Finally, and again without a hearing, the Court concluded that the post-trial deposition testimony of Goberman, which established Goberman's perjury at trial regarding the essential element of the crimes charged against Parness, did not warrant a new trial (J554-J555). The Court reached this conclusion without considering Parness's contention that the government knew of this perjury at trial and let it stand uncorrected.

G. The Sentencing Procedure

In his motion to reduce or vacate his sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, Parness argued that sentence should be vacated because of the illegality and unconstitutionality of the sentencing procedure employed by the Court, particularly as it involved the Government's invocation of the "Dangerous

Special Offender Statute," 18 U.S.C. § 3575, *et seq.* (1970).[15]

Judge Bonsal's decision denying the motion completely ignored this crucial contention (J561).

The illegality and unconstitutionality of the sentencing procedure, however, raise grave questions, including some of first impression for this Court and form the basis for the instant appeal.[16]

Prior to Parness's trial, the United States Attorney submitted a "Notice and Application" to the Chief Judge of the District alleging Parness was a "dangerous special offender" under 18 U.S.C. § 3575(e)(1) and (2) (1970) and therefore eligible for a sentence of up to 25 years (in the event of a conviction) under § 3575(b) (J611).

The Notice and Application further requested that to "insulate[e] the trial judge from knowledge" of the proposed Special Offender designation, the Notice should be sealed; on September 5, 1975 Chief Judge Edelstein sealed the documents (J614).

---

[15] Parness also argued that the sentence should be "reduced" for three reasons, *i.e.*:

(a) his exemplary behavior in both work and family life since his conviction;

(b) the disparity between his sentence and others convicted of similar crimes; and

(c) the "newly discovered evidence" which is described in the preceding portion of this brief.

Parness believes that the judge failed to consider or give adequate weight to these contentions.

[16] It is clear in this Circuit that attacks on the illegality of the sentencing procedure need not be made on direct appeal from the conviction, but may be properly made (and, of course, reviewed here) in a Rule 35 motion. *United States* v. *Lopez*, 428 F.2d 1135, 1138 (2d Cir. 1970).

After the jury's verdict, the § 3575 Notice was unsealed by order of Chief Judge Edelstein, a hearing pursuant to § 3575(b) was noticed, and the government submitted a "Memorandum in Connection With the Sentencing of Milton Parness" (J615).[17]

At the hearing on whether Parness should be sentenced as a dangerous special offender the government was permitted to introduce evidence in three separate areas, and these will be described briefly and *seriatim*.

The government first submitted transcripts of tapes which were the product of electronic surveillance in New Jersey in the early 1960's. These tapes purported to contain certain conversations between an unidentified person and one "Gyp" De Carlo, allegedly a "notorious organized crime figure" (J623). The transcripts were not furnished to counsel prior to the "hearing" and Mr. De Carlo, who apparently died prior to the hearing, obviously was not available for cross-examination.

The Government then called a Special Agent, William F. Glase who testified at length about (a) an alleged defense to *another* case, allegedly "prepared" by an attorney for Parness[18] and (b) information which he, Glase, had received or obtained which may or may not have

---

[17] The Memorandum proceeded to claim that Parness fell within each of the three categories of "special offender" set forth in § 3575(e). It concluded by summarizing the nature of the evidence it intended to offer to bring Parness within each of these categories.

[18] Apparently, the defense to that "case," which involved tax violations, was based on the contention that a certain $60,000 received by Parness was the product of loans from three persons, and not marker collections. Putting wholly aside the propriety of "trying" a separate case without indictment or jury trial in a sentencing proceeding, it is impossible to determine from Glase's testimony even what that purported "case" was.

shown that that "defense" was false. Numerous documents were marked as evidence and received, including one which was submitted for the Judge's *in camera* inspection.[19]

Objections to such testimony were expressed and noted (J632). Counsel also expressed considerable confusion as to just what the purpose of this "mini-trial" was (J648), but the judge stated:

> Well, gentlemen, I take it the purpose of this is to take evidence to convince me that in the sentence I should consider all this. I am going to be pretty liberal on it. I want to know what there is. It is not a trial. There is no jury here (J643).

Finally, Mozolak, a probation officer, testified that subsequent to Parness's mandatory release from prison, Parness was placed under his supervision. During the time of this supervision, Parness made certain requests to travel to St. Maarten which were apparently granted by the United States Board of Parole in Washington.

The Government attempted to show that Parness had to report that he was engaged in gambling activities and that his failure to do so was presumably a crime. On cross-examination Mozolak admitted that there was no rule in his department in situations where gambling was legal (J669).

The hearing closed with the judge's statement that he had reviewed the presentence report and had also

---

[19] This was Government Exhibit 6 which was and is unavailable to Appellant and his counsel, and which purports to be grand jury testimony of Philip Casella in the District of New Jersey (J633, p. 30).

heard the additional evidence the Government has brought out this afternoon, and I will consider that in connection with the sentencing (J671).

After a presentation by Parness's counsel, the judge sentenced him to 10 years on each count, the sentences to run concurrently, and a total fine of $55,000. The proceeding concluded with the following entirely ambiguous colloquy: [20]

Mr. McGuire: Your Honor, has the Court made a determination that the defendant Milton Parness is a dangerous special offender?

The Court: I have heard the testimony, and I have sentenced the defendant according to my best lights, Mr. McGuire, and I am not making any further determination at this time.

Mr. McGuire: Thank you, your Honor (J688).

ARGUMENT

Introduction

This case squarely presents blatant, massive and unprecedented examples of the government's failure to disclose

(1) information that vitally concerns the motivation of the key government witness, *United States* v. *Sperling*, 506 F.2d 1323, *United States* v. *Badalmente*, 507 F.2d 12 (2d Cir. 1974).

---

[20] The ambiguity was resolved only by the written judgment, (728a), where it was revealed that the judge had *not* sentenced Parness as a dangerous special offender.

(2) evidence concerning the key government witness's eagerness to cooperate with the prosecution, *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974); *United States* v. *Sperling*, *supra* at 1333;

(3) facts concerning the key witness's desperate mental and physical state, *United States* v. *Pacelli*, *supra;*

(4) direct exculpatory evidence, cf. *Grant* v. *Allredge*, 496 F.2d 376, 381 (2d Cir. 1974); and

(5) information establishing the key witness's perjury at trial regarding exculpatory and other facts, *United States* v. *Pacelli*, *supra; United States* v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975).

It is established law in this Circuit that the standards governing the grant of a new trial vary according to the government's culpability in not disclosing the evidence.

If the failure to produce the evidence was "intentional," or the result of "gross negligence" or the "ignor[ing] of evidence whose high value to the defense" could not have escaped the prosecutors' attention, "a new trial is warranted if the evidence is merely material or favorable to the defense." *United States* v. *Morell*, Dkt. No. 74-1827 at 5880 (2d Cir. Decided Aug. 29, 1975); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. den.*, 411 U.S. 982 (1972).

However, if the nondisclosure is "merely inadvertent" a new trial is required only if there is a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.

United States v. *Seijo*, *supra* at 1364; *Grant* v. *Allredge*, *supra* at 380.

Given these precedents, it is apparent that in order to merit a new trial, a defendant need prove that the undisclosed letters were material and/or favorable, and either

(1) that the material was deliberately suppressed; or

(2) that the prosecutor's failure to disclose the material constituted gross negligence.

If a defendant can establish neither (1) or (2) a new trial will still be required if he can show that material inadvertently withheld meets the more stringent "skilled counsel" test.

In the instant case, without holding a hearing the District Court concluded that neither (1) nor (2) had occurred and proceeding to the more stringent standard, held that the undisclosed evidence did not meet the "skilled counsel" test.

We argue, *infra*, that the undisclosed evidence clearly meets the skilled counsel test and requires a new trial (Point I); that the evidence and facts disclosed in the government's affidavits demonstrate as a matter of law that the government's failure to turn over the letters constituted gross negligence and warrant a new trial (Point II); and finally, that at the very least, a hearing on the issue of inadvertence was required as a matter of law (Point III).

In Point IV, *infra*, we argue that the District Court was required to hold a hearing on the issue of whether the government made promises to Goberman in exchange for

his testimony. This hearing was denied despite substantial evidence that the promises were made and without adequate denial from the government.

The post-trial deposition testimony of Goberman establishes that he perjured himself at trial regarding the critical element necessary to sustain Parness's conviction. We argue that this perjury which was known to the government and not disclosed at the trial requires the granting of a new trial (Point V).

At Parness's sentence, a hearing was held on whether he should be sentenced as a Dangerous Special Offender, 18 U.S.C. § 5375, *et seq.* (1970). At the hearing all manner of highly prejudicial, inflammatory and incompetent evidence was admitted into evidence and considered by the sentencing judge. The judge declined to treat Parness as a Special Dangerous Offender, but it is extremely likely that this hearing prejudiced Parness and resulted in his harsh ten-year sentence. Parness argues that the hearing was jurisdictionally defective, should not have occurred, and requests a resentence before another judge (Point VI).

POINT I

The undisclosed letters meet the skilled counsel test and require a new trial.

An analysis of the undisclosed letters compels the conclusion that had these letters been available to counsel at trial, there is more than a "significant chance" that Parness would not have been convicted.

The letters will be analyzed in light of the legal categories set forth in the Introduction, *supra* at 24-25, and discussed *seriatim*.

(1) The Nondisclosure of Evidence Establishing Goberman's Motivation for Cooperating With the Government and Giving Evidence Against Parness

The law is well settled that evidence as to a witness's motive [21] for testifying favorably to the government is so important that its suppression will mandate a new trial, *Napue* v. *Illinois*, 360 U.S. 264 (1959); where the witness's testimony is critical to guilt or innocence, a new trial is required *even where* the nondisclosure is inadvertent, *United States* v. *Sperling*, *supra* at 1333.

Goberman's testimony was clearly critical to Parness's conviction, but his testimony was literally devoid of any motive—save telling the truth—for his cooperation with the government.[22]

In this relative void, defense counsel attempted valiantly to uncover and exploit some motive; but the only one even suggested by available evidence was that Goberman had cooperated with the government in return for a suspended sentence on federal criminal charges (253a-

---

[21] A witness's motivation for testifying is an element, and a crucial one, which the jury may and should use in evaluating credibility; *e.g.*, *United States* v. *Harris*, 501 F.2d 1, 9 (9th Cir. 1974). Accordingly, motive testimony is not merely "cumulative" to general evidence impeaching a witness's credibility.

Thus, although Goberman's credibility was called into question by his convictions for crimes involving false statements and government stipulations that his testimony regarding two collateral matters was incorrect, such testimony is not "cumulative" with motive evidence.

[22] Indeed he testified, and the jury no doubt believed, that he "hated" the prosecutors, *infra*.

270a). Unfortunately for counsel—and ultimately for Parness—the record provided no real support for this theory [23] and Goberman's strong denials of this motive may well have even further convinced the jury of his truthfulness.[24]

In fact, however, although defense counsel had no way of knowing it, Goberman had strong and ample motivation for cooperating with the government; indeed, his "cooperation" extended to doing "*everything* [the government] asked" (J574).

The twenty-six undisclosed letters demonstrate unquestionably that Goberman wanted desperately to recover the $60,000 seized by the I.R.S. See letters at J585, J586, J587, J589, J590, J592, J593, J594-595, J598, J600.

Goberman wrote to Campbell:

> LAST WEEK, WHEN I WAS IN YOUR OFFICE, WE DISCUSSED BRIEFLY THE MATTER OF "SAM NORBER—I.R.S.—(MY) 60,000 MATTER. YOU TOLD ME THAT YOU WOULD LOOK INTO THIS AND POSSIBLY (ADVISE) SUG-

---

[23] While the minutes of Goberman's sentencing hearing reflected his cooperation with the government, they did not establish that such cooperation was the *quid pro quo* for the suspended sentence.

[24] On redirect, the prosecutor completely undercut the defense's leniency theory by demonstrating that Goberman was indicted *after* he had given evidence to the grand jury in the following devastating exchange:

> Q. Now, was it before or after that grand jury appearance that you were indicted for the second time?
> A. Yes, sir, after
> Q. Before or after?
> A. After, if I remember.
> Q. Within a month, wasn't it?
> A. Yes, sir.
> Q. *Some deal, right Mr. Goberman?* (550a)

> GEST THE STEPS I (MUST) SHOULD TAKE IN ORDER TO EFFECT THE RECOVERY OF THIS MONEY . . . AND SUGGESTED I DROP YOU A LINE. (J585).

Goberman further believed that the prosecutors would help him in making this recovery as reflected in, *e.g.*, his diary, a page of which was attached to a letter sent to R. J. Campbell. He wrote:

> WELL, HERE I GO STICKING MY NECK OUT AGAIN—MORE HOPES—I GUESS THOSE "HOPES" KEEPS ME GOING—NO "HOPE—NO NOTHING"—*ANY WAY R.J., I BELIEVE, IS TRYING TO HELP—HE KNOWS AND HAS THE (MY) RECORDS ETC.—TO PROVE THAT THE 60,000 IS MINE*—(Emphasis added) (J586).

Finally, Goberman clearly believed that his cooperation was the *quid pro quo* for such help. Another letter pleads:

> I'VE DONE EVERYTHING R.J. [CAMPBELL] HAS ASKED OF ME—YET NO ANSWERS—SAME APPLIES TO HAL SWAIN—BILL GLASE & YOU. (J574).
>
> MIKE, I'VE AT ALL TIMES DONE (ANYTHING) EVERYTHING YOU'VE ASKED ME TO DO—(J572).

Whatever the government's ultimate plans for the $60,000 were, the letters reflect that the requested "help" was actually furnished in a way that clearly reinforced Goberman's beliefs and further strengthened his motives for continued cooperation.[25]

---

[25] For example, Goberman requested and was given the name of a specific I.R.S. agent—one Sidney Resnick—to whom he should send a form (also given him by Campbell) claiming the $60,000. With or without the government's titillation, he leaps from this fact to the following rather staggering assumption about the help he can expect from Campbell.

[Footnote continued on following page]

The letters—and the prosecutors' subsequent affidavits in response—give numerous additional examples of Goberman's expectations and the fuel by which they were fired.[26]

Although all of this material was absolutely dispositive of Goberman's true motivation—and in fact contradicted the weak and ultimately self-defeating leniency theory on which defense counsel was forced to rely—the government never disclosed it to either the Court or defense.

Like similar evidence in *United States* v. *Sperling*, *supra*[27] and *United States* v. *Pacelli*, *supra*,[28] the undis-

---

> MR. RESNICK (TO WHOM I'M SENDING COPY OF THIS LETTER) WOULD LIKE TO DISCUSS THIS MATTER [the $60,000] WITH YOU AND I'D APPRECIATE YOU TWO MEN GETTING TOGETHER AS SOON AS POSSIBLE AND GET THIS MATTER FINALIZED (J589).

[26] For example, Goberman requested help from Campbell with regard to a deposition in an action against him brought by other stockholders in the hotel:

> R.J.
> HAVE YOU ANY SUGGESTION? =
> IF I GO TO THIS 'PRE-TRIAL' 'THING' =
> THEY'LL (ATTY'S) MAKE MINCE MEAT OF
> ME = (J575).

Campbell also sent Goberman a copy of the Canadian prospectus in which Hotel Corp's shares were offered for sale (J570).

And in response to a request to McGuire for the transcripts of certain tapes he wanted, the government has stated significantly that McGuire

> *would not give him any further help* than supplying him with copies of trial evidence and other documents which are public records (Rosenthal affidavit at J389).

[27] In a startlingly close analogy, this Court reversed where the government failed to disclose a letter which

> contained expressions of Lipsky's appreciation for some of the favors for which the government had been responsible in the past—or so Lipsky thought—in return for his cooperation and testimony. *Id.* at 1333.

[28] In that case, an undisclosed letter revealed that the witness was willing to "do anything" for certain help from the government.

closed evidence would unquestionably have become the "capstone" of defense counsel's exposure of Goberman's motive and attack on his credibility.

As such, it clearly meets the skilled counsel test, and, as this Court wrote in *Pacelli*:

> Denial of the opportunity to use such forceful impeaching material bearing on the credibility of the government's key witness mandates a new trial. *United States* v. *Pacelli, supra* at 1119.

(2) The Nondisclosure of Evidence Concerning Goberman's Rapport With the Prosecutors and Eagerness to Cooperate With the Government

At trial Goberman testified he "hated" Treasury Agent Glase and he "hated" the prosecutors because they tried to put him in jail (271a).

He resisted all questions by defense counsel which in any way implied that he was a willing, cooperative witness or that he had any special interest in building a case against Parness:

> I went there [the grand jury] because I was asked to go by my government to appear. I went there. I was subpoenaed but I really had no personal——
>
> * * *
>
> I didn't care what it involved, who it involved. (Emphasis added) (298a).

However, contrary to this picture Goberman painted for the jury of an uncooperative, resistant witness who hated the prosecutors, the undisclosed letters reflect a friendly, warm relationship. Letters to Campbell are addressed "R.J." and Pollack is referred to as "Mike." The letters are frequently signed "Allan." After speaking with Campbell by phone Goberman writes

DEAR R.J.

I CAN'T TELL YOU HOW GOOD IT WAS TO TALK TO YOU TODAY—AFTER YOU HUNG UP—I FELT LIKE THE "SECOND RESURRECTION"

* * *

AS EVER ALLAN (J579).

In addition to this excellent rapport revealed by the undisclosed letters, virtually half of them show Goberman eagerly and voluntarily produced evidence for the prosecutors, *e.g.* (J591).

This cooperation reached unprecedented heights when Goberman, believing that the prosecutors wanted evidence which was located in St. Maarten, actually went there, lied to Parness as to the financing of the trip, and passed a bad check in the bargain (J604).

Like the letters in *Sperling* and *Pacelli*, *supra*, Goberman letters totally contradicted the image he so skillfully portrayed at trial. Had defense counsel known of the letters, Goberman's true position could easily have been exposed with devastating effect.

Like *Sperling* and *Pacelli*, the undisclosed evidence on this point clearly meets the "skilled counsel" test and requires a new trial.

(3) The Nondisclosure of Facts Concerning Goberman's Desperate Mental and Physical State

The undisclosed letters show that Goberman was emotionally distraught and physically ill as a result of "pressures" from the case and the prosecutors. In a page

from his diary annexed to one of the letters to the prosecutors he wrote:

> *THIS WHOLE THING HAS GOT ME DOWN.* (Emphasis in original)
>
> * * * * *
>
> *I DAM NEAR HAD A HEART ATTACK THRU THE PRESSURES.* (Emphasis added) (J569)

And in a letter he wrote to Pollack on January 27, 1973:

> *MIKE, IT'S BECOMING INCREASINGLY HARDER FOR ME TO COPE WITH ALL THESE SITUATIONS MUCH LONGER,* THE 'ENDLESS WAITING' IS BEGINNING TO GET TO ME—THE MONSTROUS INJUSTICE OF THE SITUATION IS BECOMING UNBEARABLE.
>
> *LAST [NITE] (sic) (SUNDAY) I BECAME VERY ILL AND FELT I WAS GOING TO GET ONE OF THOSE "FIBULATIONS"* (HEART ATTACKS) — I GUESS THE GOOD LORD — PULLED ME THRU THAT ONE—MIKE I'VE GOT TO HAVE SOME ANSWERS — VERY SOON — OTHER WISE I FEEL THAT *EVERYTHING* IS LOST AND THERE'S NO MORE *Hope.* (Emphasis added) (J572-J574)

Additionally, the appearance of the letters virtually compels a conclusion that Goberman is mentally unstable. They are hand-printed, employ only capital letters, annex pages of Goberman's diary, and abound in an inability to choose appropriate language.[29]

---

[29] Although defense counsel have never seen the originals of these letters, it is reasonable to assume that, like the post-trial letters written by Goberman, each contains the additional bizarre feature of being written in various colored inks.

> YOU TOLD ME THAT YOU WOULD LOOK INTO THIS AND POSSIBLY (ADVISE) SUGGEST THE STEPS I (MUST) SHOULD TAKE IN ORDER TO EFFECT THE RECOVERY OF THIS MONEY. . . . (J585)

These letters offer broad, damaging and potentially devastating avenues of cross-examination for defense counsel. Coupled with the certain effect they would have caused on any jury to whom they were shown, they clearly meet the "skilled counsel" test and require a new trial.

(4) The Nondisclosure of Direct, Exculpatory Evidence

The evidence discussed in subsections (1)-(3) above is, under the case law, enough in and of itself to require a new trial.

But totally aside from the arguments already made, the letters establish that Goberman's trial testimony as to two crucial elements of the government's case was false.

The government's case, and this Court's affirmance, contain basic assumptions as to two vital facts in the chain of circumstantial proof that Parness's loan to Goberman included unremitted and, therefore, converted marker collections.

These facts were that Parness had "exclusive" control over the junkets and marker collections, *United States* v. *Parness*, *supra* at 434, 436; Govt. Brief on Appeal, pp. 4-5, 22; Goberman testimony at 70a-71a, 115a-116a, and that, around the critical dates, $60,000 in cash seized by the I.R.S. was intended for Parness. *United States* v. *Parness*, *supra* at 436, Govt. Brief on Appeal, pp. 22-23.

The letters withheld by the prosecution completely contradict these two essential facts.

First, contrary to his trial testimony, relied upon by this Court, Goberman's undisclosed letters establish that others besides Parness ran junkets and collected markers:

> SAMUEL NORBER, OF DETROIT, MICHIGAN, AS A JUNKETEER OPERATOR, WAS RESPONSIBLE TO COLLECT AND DELIVER TO ME, OR MY DESIGNATED AGENTS, ALL GAMBLING LOSSES OF HIS OWN—HIS PERSONAL ASSOCIATES—AND THE PEOPLE HE BROUGHT TO THE CASINO ON HIS JUNKETS. (J594)

And, lest there be any question that Parness was somehow a "designated agent" who received Norber's collections, Goberman wrote in another letter:

> SOMETIME IN JANUARY 1971 — SAMUEL NORBER WAS BRINGING $60,000 — FROM DETROIT-TO-NEW YORK — TO BE DELIVERED *TO ME* AS A PARTIAL COLLECTION OF GAMBLING DEBTS DUE. . . . (J594)

Accordingly, Parness was not and could not have been the "exclusive" junketeer which the government argued, and which this Court believed him to be.

This second letter, along with others, *e.g.* J585, J586, also completely disproves the second factual premise—that the seized $60,000 was intended for Parness.

This is important for several reasons: First, it disproves this Court's assumption that the $60,000 allegedly

going to Parness showed that he was making substantial marker collections at the time of the Holzer loan. Since the money was *not* going to Parness, no such inference can now be drawn. *United States* v. *Parness, supra* at 436.

Second, although the government argued:

> The 155,000 [loan to Goberman] would have been made up from the $99,000 cash on hand plus $60,000 in cash from a gambler named Norber (Tr. 530-533). Unfortunately for Parness, the 60,000 was seized by the Internal Revenue Service *before its delivery to Parness.* (Govt. Brief at 22-23)

the letters showing that the money was going directly to Goberman entirely contradict the inference that the $60,000 was to be loaned by Parness to Goberman.

Finally, the fact that the $60,000 in question was actually going from Norber directly to Goberman refutes the government's theory that it was the seizure of this money which precipitated the alleged cover-up, a theory deemed crucial by this Court in its affirmance. *United States* v. *Parness, supra* at 436.

The undisclosed letters disprove essential elements of the government's proof, elements without which a conviction of Parness could not have been obtained. Obviously, such undisclosed evidence cannot be cumulative or merely impeaching. Irrefutably, the "skilled counsel" test established by the Circuit has been met and a new trial is required.

(5) The Undisclosed Letters Establish Goberman's Blatant Perjury at Trial

As in *United States* v. *Seijo*, *supra*, and *United States* v. *Pacelli*, *supra*, the undisclosed letters demonstrate conclusively that Goberman told numerous and blatant lies while testifying. He lied about essential material facts at trial, he lied about and concealed his motives for testifying and he lied about his relationship with the prosecutors.

Totally aside from the complete culpability of the prosecutors who sat silently while their key witness piled lie upon lie,[30] Goberman's repeated perjury also meets the "skilled counsel" test and requires a new trial.

The overwhelming weight and importance of the material withheld by the prosecution compels the conclusion that the cumulative effect of that material, developed by "skilled counsel", would surely have "induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

POINT II

The Prosecution's failure to turn over material of which it had knowledge and which was of high value to the defense constituted gross negligence as a matter of law, and regardless of whether the nondisclosure was deliberate or not, requires a new trial.

This Court has established that if the prosecution has deliberately suppressed evidence *or* ignored evidence whose high value to the defense could not have escaped his attention a new trial is required if the evidence is merely ma-

---

[30] The government's permitting Goberman's perjurious testimony to go uncorrected, which testimony it knew as false by its possession of the letters, is an independent ground for granting a new trial. *Napue* v. *Illinois*, 360 U.S. 264 (1959).

terial or favorable to the defense, *e.g.*, *United States* v. *Kahn*, *supra* at 287.

Decisions of this Court equate the ignoring of evidence of high value to the defense to "gross negligence" *United States* v. *Morell*, *supra* at 5880, such as to require a new trial.

In determining only that the government's nondisclosure was inadvertent rather than deliberate, the District Court totally missed this second, essentially *legal* issue. The factual question of whether the nondisclosure was deliberate obviously depends on *subjective* determination of the prosecutor's knowledge, intent and motive. Such determinations must be based on facts, which can be determined only after a hearing with testimony and cross-examination. (See Point III, *infra.*)

The gross negligence test, on the other hand, requires a purely objective evaluation of the undisclosed material and its *legal* importance to the case. Such an objective, legal determination can be made as easily by this Court on review [31] as by the District Court because a finding of the high value of the material *as a matter of law* requires no hearing.[32] The facts, both as to the high value of the evidence and the prosecutor's knowledge [33] are indisputable.

---

[31] Of course, this Court need consider the "gross negligence" question *only* if it fails to adopt Appellant's argument in Point I.

[32] The gross negligence test also requires a determination, unlike that discussed in Point I, as to the material's "high value" *prior* to trial. Thus, material which might, after trial, appear to be cumulative, would, if obvious and important enough, still have required disclosure *prior* to the trial.

[33] To meet the gross negligence test, it must be remembered, only the objective fact of whether the prosecutors *knew* of the evidence is required; the subjective question of why they failed to turn it over is irrelevant.

The former, discussed at length, *supra*, at pp. 27-39 is obvious.[34] The latter, *i.e.*, whether the prosecutors "knew" of the evidence (and could therefore be deemed to have "ignored" it) is, on the uncontroverted facts, equally clear.

The prosecutors who received the letters were intimately connected with the prosecution. The District Court's statement that the letters were not sent to the prosecutors who prepared and tried the case is simply wrong (J557).

R. J. Campbell, to whom fifteen of the letters were sent, is the prosecutor who supervised the case, obtained the indictment, helped prepare Goberman for trial and sat at counsel table for the first few days while Goberman was testifying (see pp. 9-10 *supra*). The letters from Goberman, who Campbell described as his witness, leave no doubt that he knew of the letters.

McGuire, the Assistant who tried the case, was *himself* the recipient of one of the letters.

Dowd worked closely with Campbell and McGuire in preparation of the case; he has never denied knowledge of the majority of the letters[35] and, in any event, knowl-

---

[34] *I.e.*, evidence which was exculpatory, which established motive and expectations, which showed extreme cooperation with the prosecution and which finally demonstrated the key witness's deteriorating mental and physical condition.

[35] Dowd states *only* that prior to the trial he was not aware of the sever letters "contained in the Administrative files of this Strike Force;" his pre-trial knowledge of the other, key nineteen letters is nowhere denied (J480).

edge of their existence and content is imputable to him as a matter of law. *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *United States* v. *Duardi*, 384 F. Supp. 861, 863-64 (W.D. Mo. 1973) *Govt. Appeal dismissed for lack of jurisdiction*, 514 F.2d 545 (8th Cir. 1975).[36]

As in *United States* v. *Badalamente, supra*,

> There is no dispute that the letters were in the possession of the prosecution during the trial, the government had bound itself to produce Jencks Act material and to comply with the *Brady* rule, the significance of the letters was evident on their face, and their importance as tools for impeachment of a crucial witness was inescapable. *Id.* at p. 18.

As the gross negligence test has been met as a matter of law, also, as in *Badalemente*,

> . . . no useful purpose [would] be served by a remand.

The Court must reverse and grant a new trial. See also, *Grant* v. *Allredge, supra* at 498.

---

[36] The language of this latter case, applying *Giglio* principles to attorneys, like Campbell and Dowd, who are members of the Strike Force, is particularly appropriate here. The Court forcefully wrote:

> Certainly, if staff lawyers in a state prosecutor's office must as Chief Justice Burger stated in *Santobello* v. *New York*, 404 U.S. 527, 262, let *"the left hand know what the right hand is doing," the same thing must be true in regard to government Strike Force attorneys who apparently are a part of the Department of Justice itself, rather than members of a United States District Attorney's staff.* See former Assistant Attorney General Will Wilson's article in 46 Notre Dame Lawyer 41, 44 (Fall, 1970). . . . (emphasis added) *Id.* at 863-64.

POINT III

The District Court's failure to hold a hearing prior to concluding that the nondisclosure of the letters was inadvertent totally ignored established law in this Circuit and requires a remand

The question of whether this case must be remanded for a hearing need be reached *only* if this Court rules against Appellant on both Points I and II, *supra*, since determination of the issues in both those points is an entirely legal one which can and must be made on the record as it stands.

The present record is, however, entirely inadequate for the District Court to have made, or this Court to review, whether the government's nondisclosure of the letters in question was deliberate or inadvertent.

This Court's recently decided cases establish that a finding of "inadvertence" on the part of the prosecutors in not disclosing evidence must be made at an adversary hearing where all relevant facts can be developed. *United States* v. *Hilton*, 521 F.2d 164 (2d Cir. 1975); *United States* v. *Morell*, *supra*.

As this Court held in *United States* v. *Hilton*, *supra* at 167:

> Our interest in enforcing the prophylactic rule requiring that a new trial be granted in cases of deliberate nondisclosure dictates that the facts surrounding the nondisclosure be developed in an adversarial context.

Despite the holding of the *Hilton* case and Parness's demand, no adversary hearing was held. Rather, without

any affidavits from Campbell, McGuire, Glase or Pollack, the prosecutors who received the letters, and upon the ambiguous affidavit of Dowd, a prosecutor who received none of the letters, the District Court found that the nondisclosure was inadvertent (J559).

Without a hearing, however, numerous questions simply have not been answered; the District Court's failure to hold a hearing graphically underscores the reasons for this Court's rule that where the deliberateness or inadvertence of nondisclosure is at issue, an adversarial hearing must be held. *United States* v. *Hilton, supra; United States* v. *Morell, supra.*

POINT IV

The crucial facts regarding promises made to Goberman by the prosecutors could not be determined without a hearing and the District Court erred in denying appellant's request for such a hearing.

Parness's motion for a new trial set forth facts demonstrating that the prosecutors had promised Goberman the return of the hotel and help with the return of the $60,000 seized by the I.R.S. in exchange for his cooperation in the Parnes case. These promises were never disclosed to defense counsel.

Obviously, if such promises were made to Goberman and not disclosed to defense counsel, a new trial is required. *Napue* v. *Illinois, supra.*

(1) The Promise to Return the Hotel

The District Court gave two reasons for its determination that the prosecutors had not promised Goberman the return of the hotel.

First, the Court found that one of Goberman's statements [37] which appellant offered as proof of the promise was "ambiguous" (J559). Even assuming that this is the case, the Court completely and fatally ignored a second, entirely unambiguous statement contained in a sworn complaint, *i.e.*

> 70. ROBERT J. CAMPBELL, ESQUIRE, CHIEF, STRIKE FORCE 18 WASHINGTON, D.C. ADVISED PLAINTIFF (GOBERMAN) THAT QUOTE "THE GOVERNMENT WANTS TO CONVICT THE RACKETEERS WHO STOLE THE HOTEL AWAY FROM YOU *AND HAVE IT RETURNED TO YOU.*" (Emphasis supplied) (J549).

Second, the District Court apparently found the prosecutors' affidavits contained adequate denials that such a promise was made. This, clearly, is not the case. Campbell, who Goberman states actually made the promise, never denies that he did so, but merely says,

> *that to the best of his present recollection*

no such promise was made (J454).

McGuire's affidavit is even less persuasive. It not only leaves open the possibility that Campbell made such a promise but suggests it. As McGuire says, he "cannot comment on matters before the Spring of 1973," the period in which Goberman was Campbell's witness, but that after this date:

---

[37] This statement, which Goberman made at oral argument in a civil case brought against Parness, is that

> the United States government was supposed to have sued for the recovery under the Act and to have recovered the hotel and returned it to me, and I'm trying to put myself in their position (J345).

> There was no agreement, express or implied, that Mr. Goberman could expect *any consideration from the United States Attorneys office for the Southern District of New York.* . . . (J447)

McGuire carefully restricts his statement to the prosecutors in the Southern District of New York. This leaves out R. J. Campbell.

The affidavits of the other prosecutors similarly fail to negate a promise by Campbell.

Since the record does not contain, as the District Court thought, evidence clearly disproving the hotel promise, and in fact strongly supports the existence of such a promise, a hearing must be held.

(2) The Promise to Help Goberman with the Return of the $60,000

Again, without a hearing, the District Court "determined" that this promise was not made because, it felt, the letters did not make out a sufficient case for such a promise. Again, as the letters demonstrate, the Court was wrong (J585; J586). The text of these letters is set forth in Point I(i), *supra.*

The letters further reveal that at least some of this promised "help" was actually forthcoming. Campbell supplied Goberman with the name of the I.R.S. agent to whom the forms for recovery should be sent.

Campbell, also, admits in his affidavit that he supplied Goberman with the I.R.S. form necessary to recover the money (J454); Rosenthal's affidavit states that Goberman was supplied with trial records (J389).

Like the hotel promise, the affidavit of R. J. Campbell is inadequate to dispel the strong impression that such a promise was made. Campbell states

that to the best of his present recollection

no promise to help Goberman with the return of the $60,000 was made (J454).[38]

Again, since the "facts" contained in the record are singularly unpersuasive for a finding of no promise, the District Court erred, and a hearing must be held.

POINT V

The Government's knowing use of Goberman's false testimony and the suppression of evidence favorable to the defense requires a new trial.

As previously stated, an essential element in the Government's case was proven by Goberman's testimony that on the relevant dates, Parness owed Hotel Corp. $350,000 in markers receivable.

Depositions taken subsequent to trial[39] undercut, if not entirely disproved this element in three separate ways. In fact, the material contained in the deposition compels the conclusion that Parness was innocent of all the crimes charged in the indictment.

Additionally, and of crucial legal import, the depositions revealed that prior to and at the time of trial, the government was fully aware of the falsity of Goberman's testimony, but did not disclose this either to the Court or to the defense.

---

[38] The affidavits of the other prosecutors on the $60,000 promise are similar to the hotel promise, and similarly do not cure the lapse in Campbell's memory.

[39] These depositions were taken approximately one year after trial pursuant to a civil suit filed by Goberman against Parness. They are set forth in the Appendix at J48-309 and are fully summarized in an affidavit appearing at J18-24.

These issues, and the legal ramifications thereof, will be discussed *seriatim.*

(1) Incorrect Gross Totals

Goberman's trial testimony was premised on "worksheets" of the junkets which were exhibits at trial [40] and which demonstrated $350,000 due and owing from the "sole" junketeer, Parness.

In his deposition, however, Goberman conceded that if the marker pickups in the government exhibits added up to $233,000 and not $350,000, the $233,000 was the correct gross total of uncollected markers (J184-185). And indeed, when the marker columns are added up, only $233,000 is found to be outstanding.[41]

(2) Unacknowledged Deductions

At trial, Goberman testified that Parness did not receive the usual junketee's commission,[42] but was paid only through the commission earned by his travel agency on flights to St. Maarten (512a-513a, 518a). Thus, according to Goberman, Parness could not deduct the normal junketeer's compensation.

---

[40] The Government represented that the worksheets contained this total when McGuire stated:

> If it will save time, your Honor, I think the records Mr. Goberman is referring to are Exhibits 167 through 177 for identification, copies of which Mr. Cohn has. Exhibit 167 is in evidence. I am handing these exhibits to Mr. Cohn (493a).

[41] The way in which the actual total may finally be discerned is set forth in the affidavit submitted with the motion for a new trial, and reported at J18-J45.

[42] A junketeer was normally entitled to deduct 10% of casino winnings, $50.00 per person, and the cost of the air fare from the markers he collected (73a).

However, in his deposition Goberman conceded that Parness could make these three deductions from the total of markers owed (104a-105a, 116a, 186a). On the basis of this concession, approximately $85,000 should have been deducted from the total markers Parness owed (J104-106).

(3) Unacknowledged Remittance of Marker Collections

At trial Goberman testified that he kept pressing Parness for marker collections to pay off the Holzer loan which was due on February 3, 1971, but that Parness came up with no marker collections (127a).

Goberman's deposition establishes otherwise. He conceded that between November 16, 1970 and January 14, 1971 Parness had remitted at least $129,000 in marker collections to Hotel Corp. (J41, 177-179). Goberman admitted that during this period he had control over the Hotel Corp's funds and that this $129,000 should be credited against the marker receivables. Goberman further admitted that some of this money was paid with checks filled out in his own handwriting (J175-76).

(4) Significance of the Deposition Material

When all of the material disclosed in the depositions is considered together, a startling conclusion emerges. On the crucial dates, Parness owed Goberman not the $350,000 the government claimed to have proven at trial, but, at most, the sum of $8,000.[43]

The conclusion is inescapable that Parness could not have loaned Goberman $160,000 of his own money when the most he owed him was $8,000. Accordingly, on the

---

[43] This is arrived at by subtracting both junketeers' deductions of $85,000 and checks remitted of $129,000 from the marker total of $233,000. It also includes a deduction of $10,000 which Parness gave to Goberman during this period (J39).

basis of this new evidence, Parness was not guilty of the substantive counts of the indictment and, similarly, the conviction on Count I cannot be sustained.

(5) The Government's Knowledge

The junket "worksheets" were in the Government's possession for many months prior to trial, and were carefully examined by it (J224-226). Accordingly, the Government knew that Goberman was lying when he testified that $350,000 in markers were outstanding at the time of the Parness loan.

The depositions establish that the Government knew Goberman was also testifying falsely when he said that Parness did not receive the normal junketeer's compensation (J58-59).

Finally, the depositions establish that the Government was fully aware of the $129,000 Goberman received from Parness and in fact had checks in Goberman's handwriting in its possession (J42).

In the District Court the Government did not claim that it had no knowledge of the facts outlined above. Rather the Government argued, as the District Court subsequently held, that the evidence was not newly discovered because it was known or should have been known to the defense (J553-555).

Even assuming, *arguendo*, that the defense knew all the information contained above [44] the Government's prob-

---

[44] Of course it did not. For example, the defense did not know that the prosecution actually had checks in Goberman's handwriting in its possession. And although Parness himself knew that the moneys owed could not total $350,000, without the subsequent concessions contained in the depositions, he simply

[Footnote continued on following page]

lem is not resolved. For the real gravamen of the disposition material in the new trial motion is not so much that it constitutes newly-discovered evidence, as that the Government stood by silently and allowed appellant to be convicted, on patently false evidence, of a crime they knew he could not have committed.

A conviction obtained through the knowing use of false testimony must be set aside if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Napue* v. *Illinois, supra,* at 271, 272; *Giglio* v. *United States, supra,* at 154.

And this is so whether the State "solicits the false testimony or merely allows it to stand uncorrected when it appears" *United States of America ex rel. Washington* v. *Vincent,* Dkt. No. 75-2100 (2d Cir. Nov. 5, 1975); *Napue* v. *Illinois, supra,* at 269.

The fact that the defense knew or should have known some of the relevant information does not negate the requirement of a new trial where the government has relied on perjured testimony. *United States ex rel. Washington* v. *Vincent, supra,* at 386 n. 9. Nor does it dispose of the government's obligation under *Brady* to disclose favorable information to the defense. *Levin* v. *Katzenbach,* 363 F.2d 287, 291 (D.C. Cir. 1966); *Ellis* v. *United States,* 345 F.2d 961, 963 (D.C. Cir. 1965); *United States* v. *Poole,* 379 F.2d 645 (7th Cir. 1967).

---

could not prove it. At most, he could have taken the stand and offered a contrary version, but without the material in the depositions, that impermissible trade-off of his Fifth Amendment rights was too costly and too unlikely to convince the jury, or anyone else, of what he knew to be the truth.

This Court's decision in *Washington, supra,* is dispositive.[45] *Napue* v. *Illinois, supra,* similarly requires a new trial; it is an understatement to claim that the deposition testimony establishing that no crime had been committed "may [not] have had an effect on the outcome of the trial" *Napue* v. *Illinois, supra* at 271.[46]

POINT VI

The "dangerous special offender" hearing was illegal, and all evidence there adduced was inadmissible.

It is clear that the highly unusual [47] hearing held in the instant case occurred solely because of the Government's invocation of § 3575. It is also clear that at

---

[45] In *Washington,* the prosecutor had promised help in a pending criminal case to its chief witness in exchange for his testimony at trial. The witness denied at trial that any promises were made and the prosecutor allowed the false testimony to stand. The defendant, however, had been told by the witness of the promise prior to trial and communicated this to defense counsel who, despite this knowledge, remained mute. This Court, while not condoning the conduct of counsel, held that Washington could challenge the prosecutor's misconduct and reversed the conviction.

[46] In his motion for a new trial, in addition to all the grounds discussed above, Parness requested the District Court to set aside his conviction "in the interest of justice."

Because of the information described *supra,* and the inescapable conclusion that Parness did not and could not commit the crimes charged, the District Court's failure to grant the motion should be corrected and "in the interest of justice" this Court should reverse the conviction.

[47] Counsel is unaware of any other instance in this Circuit where there has been no § 3575 request and where the Government has been permitted to call and examine witnesses on collateral sentencing issues. The judge himself remarked, "I have never had one of these things before, so I am probably quite ignorant of some things here——" (J649).

this hearing, all manner of highly prejudicial,[48] inflammatory, incompetent and otherwise inadmissible material was admitted into evidence and considered by the sentencing judge.[49]

(1) The Notice Requirement[50]

§ 3575(a) clearly requires that a government attorney seeking to invoke its special sentencing provisions must file, prior to trial, a notice

> (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) *setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender.* (Emphasis added).[51]

---

[48] The very allegation that Parness might be a dangerous special offender was "conceded" by the Government so "prejudicial" that it might preclude "a fair consideration of the pending criminal matter" and resulted in the Government's request for an order sealing the Notice and "insulating the trial judge from knowledge thereof". Govt. Notice at J613. If the charge was that prejudicial *before* trial, how could it, buttressed by the Government's extensive new "evidence," have been any less prejudicial afterward?

[49] Given the extremely harsh sentence imposed, it is also extremely likely that this evidence was a material consideration in his decision. In this respect, the material submitted in Appellant's Rule 35 motion showing an enormous dispartiy of sentencing is most useful, and this Court is respectfully referred to the relevant portions of that motion (J417).

[50] While Appellant believes that the statute itself is unconstitutional, this Court need not reach that issue because the very jurisdictional requirements of the statute were never met in this case.

[51] The requirements to be met before a defendant can be adjudicated a "special offender" are set forth in subsection (e)(1)-(3) of the statute; the requirement for a finding of "dangerousness" is set forth in subsection (f).

The notice in the instant case set forth *only* allegations as to why the Government believed Parness to be a "special offender" and contained absolutely no reasons, particular or otherwise, as to why it believed him to be "dangerous" (J611-13). This governmental omission is fatal. The failure to include these allegations made the notice jurisdictionally invalid, and all subsequent proceedings were, accordingly, a nullity.

In *United States* v. *Duardi*, *supra* at 861, the Government's Notice like the one herein made no mention of the defendant's dangerousness. *Id.* at 862. The Court found the notice insufficient and stated:

> The notion that the government can proceed upon the theory that "organized crime offenders pose a special threat to the public" (Govt's Response, p. 10) and that it may ignore the Congressional command that it must include in its notice and thereafter establish both that a particular defendant is a "special offender" within the meaning of one of the three categories of § 3575(e), and is also "dangerous" within the meaning of § 3575(f), is totally without support and is directly contrary to the legislative history of the applicable statute.
>
> *Id.* at 868.

In the next case where the separate requirement of dangerousness was considered, the Government's notice alleged special offender facts and tracked the statute with regard to dangerousness. *United States* v. *Kelly*, 384 F. Supp. 1394, 1396-97 (W.D. Mo. 1974), aff'd — F.2d — (8th Cir. 1975) (17 Cr.L. Rept R 2362).

Again, reviewing both the purpose of the statute and the legislative history, the Court held

hearing could be held. *Id.* at 1400

The case law is clear, unani
The notice in the instant case was
subsequent proceedings were illega
relied upon by the sentencing jud
come in through the 3575 hearing,
illegal, the sentence must be vacate
procedure before a new judge mus

---

[52] Clearly, the evidence submitted b
hearing would not have been otherwis
to the court *in camera* grand jury testi
neither see nor confront obviously v
rights.

In addition, allegations of large scal
"Mafia" type association cannot be cons
stantial record support. See, *e.g.*, *Uni*
F.2d 626 (9th Cir. 1971), *cert. denied,*

And, a 14-year-old tape of a conv
ganized crime figure with an unidentif
reliable substantial evidence. Its high
well as the virtual impossibility of dis
make it entirely inadmissible and requir

[Footnote con

(2) The Failure to Make Findings

While the failure in the notice discussed above is, we believe, dispositive, we would note another important failure in the § 3575 notice and proceedings.

> [T]he court shall place in the record its findings, including an identification of the information relied upon in making such findings and its reasons for the sentence imposed
>
> 18 U.S.C. § 3575(b)

This requirement was not complied with.[53]

It is significant that this requirement applies *whether or not* the court chooses to sentence to defendant as a dangerous special offender.[54] This is obviously because, in the latter situation, a reviewing court must be able to accurately determine whether the evidence relied upon was improperly considered.

The instant Court's non-compliance with the statute not only invalidates the proceeding, but because it entirely precludes the requisite appellant review,[55] also

---

Finally, the "trial" of the crimes of "soliciting false affidavits" and/or "submitting false probation reports" conducted by the Government at the 3575 hearing would hardly have been constitutionally sufficient to sustain a finding of "guilt" upon which, in turn, the sentencing judge might rely. *United States* v. *Rao*, 296 F. Supp. 1145 (SDNY 1969).

[53] The Court made *no* findings, and specified *none* of the evidence on which it relied.

[54] The Court, after a valid 3575 hearing (which, of course, did not occur here) has the option of sentencing the defendant "in accordance with the law prescribing penalties" for the felony of which the defendant has been convicted.

[55] In fact, the judge's statements indicate that he *did* rely on the improper 3575 material in determining the sentence he ultimately imposed (J671).

requires that a new sentencing procedure be ordered before another District Court judge. See *United States* v. *Rosner*,[56] 485 U.S. 1213, 1231 (2d Cir.), *cert. den.*, 417 U.S. 950 (1974).

CONCLUSION

For all of the above reasons appellant's conviction should be reversed and a new trial granted. Alternatively, the case should be remanded for an appropriate hearing.

Appellant's sentence should also be vacated and he should be resentenced before a different judge.

Respectfully submitted,

JAY GOLDBERG
Attorney for Appellant
299 Broadway
New York, New York 10013
(212) 374-1040

MICHAEL RATNER
Of Counsel

---

[56] In *Rosner*, this Court held,

> We are of the opinion that a proper reading of the scope of Fed. R. Cr. P. 32 in the unusual circumstances of this case, compels a remand for resentencing. The resentencing should be done by another judge. On the facts of this case we adopt the rationale of the First Circuit, "[i]t is difficult for a judge, having once made up his mind, to resentence a defendant, and both for the judge's sake, and the appearance of justice, we remand this case to be redrawn." See Mawson v. United States, 463 F.2d 29 (1 Cir. 1972).

United States v. *Rosner*, *supra* at p. 1231.

Received 11/26/75
two copies of same
AUSA John C. Labetta